No. 93-190

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTH AMERICAN FUND MANAGEMENT CORPORATION D/B/A NORAMTRUST U.S.A., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel

ANN S. DU ROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
THOMAS L. HOLZMAN
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

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QUESTION PRESENTED

Whether the court of appeals properly upheld as reasonable the Federal Deposit Insurance Corporation's interpretation of the regulation (12 C.F.R. 564.4 (1987)) governing deposit insurance of revocable trust accounts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 991 F.2d 873. The opinion of the district court (Pet. App. A11-A16) is reported at 785 F. Supp. 176.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1993. The petition for a writ of certiorari was filed on August 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to August 1989, federal law limited the amount of deposit insurance on accounts in federally insured savings and loans to $100,000 and delegated the authority to prescribe regulations that "define * * * the extent of the insurance coverage resulting" from the $100,000 limit to the Federal Savings and Loan Insurance Corporation (FSLIC). 12 U.S.C. 1728(a) (1988).[1] The FSLIC promulgated 12 C.F.R. 564.4 (1987) to address how the $100,000 limit on deposit insurance applied to revocable trust accounts —*i.e.*, "accounts that a grantor typically sets up in his or her name for life, with a beneficiary to take at the grantor's death." Pet. App. A2. As the court of appeals in this case explained, that regulation "drew a distinction between accounts for the benefit of the spouse, children and grandchildren of the owner or grantor (allowing insurance of up to $100,000 for each *beneficiary's* interest) and accounts for the benefit of others (aggregating the account with the *owner's* individual accounts and allowing insurance of $100,000

[1] On August 9, 1989, the FSLIC was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 401(a)(1), 103 Stat. 354, and the Federal Deposit Insurance Corporation (FDIC) succeeded to the FSLIC's responsibilities as the insurer of deposits in failed savings and loans. Pet. App. A2 n.1; 12 U.S.C. 1437 note, 1821a(a)(2) (Supp. IV 1992). The FDIC was required to apply FSLIC regulations to deposit insurance claims arising out of failed savings and loans prior to promulgation of uniform regulations for deposit insurance of accounts in all financial institutions. FIRREA § 402(c)(1), 103 Stat. 358; 12 U.S.C. 1437 note (Supp. IV 1992).

for the aggregate)." *Ibid.* The regulation provided in relevant part:

> (a) Funds owned by an individual and invested in a revocable trust account * * * evidencing an intention that on his death the funds shall belong to his spouse, child or grandchild, shall be insured up to $100,000 in the aggregate as to each such named beneficiary, separately from any other accounts of the owner.
>
> (b) If the named beneficiary of such an account is other than the owner's spouse, child or grandchild, the funds in such account shall be added to any individual accounts of such owner and insured up to $100,000 in the aggregate.

12 C.F.R. 564.4 (1987).[2] As the court of appeals further explained, Section 564.4 "requires the agency to identify the 'individual' who owned the funds and invested them in the account" in order to "see whether the requisite family relation exists" to allow each beneficiary the benefit of the $100,000 limit on federal deposit insurance. Pet. App. A4.

2. In 1978, petitioner Berta Maria Bremond, a French citizen, deposited money in a revocable trust account with petitioner Noramtrust, which offered a "fiduciary service" to foreign investors who wished to invest in United States savings and loan institutions. Pet. App. A3, A6. In May 1985, Noramtrust invested the money in a certificate of deposit (CD) at Vernon

[2] The current version of the regulation, which appears at 12 C.F.R. 330.8, is substantially similar to the 1987 version in substance, but it is broader in terms of its applicability, as it covers all federally insured banking institutions, and not just federally insured thrifts.

Savings and Loan Association in Texas. *Id.* at A3. Thereafter, Noramtrust rolled over the CD every three months until August 1987, when Vernon became insolvent and was placed in receivership by the FSLIC. *Ibid.* At that time, the account contained approximately $188,000. *Ibid.*

Meanwhile, in July 1985, Bremond added her sister, petitioner Jeannette Bremond-Piquet, as a grantor, trustee, and life beneficiary of the revocable trust. Pet. App. A3. Standardized language in the trust document stated that any contribution to the trust by one grantor was a gift to all other grantors. *Id.* at A15. Nonetheless, the record does not reflect (nor do petitioners claim) that Bremond or Bremond-Piquet ever filed a gift tax return reflecting any gift of the funds in the account to Bremond-Piquet, or that Bremond-Piquet ever filed a tax return reflecting that she received any income from a life interest in the corpus of the trust. The trust had six beneficiaries. Three were daughters of Bremond-Piquet, but none was a spouse, child, or grandchild of Bremond. *Id.* at A3.

In April 1989, the FSLIC told petitioners (and in September 1989 the FDIC reaffirmed) that federal deposit insurance on the account was limited to $100,000. Pet. App. A12-A13. The FDIC determined that Bremond was the owner of the funds in the account and that she did not have the requisite family relationship with the beneficiaries to entitle each of them to the $100,000 limit prescribed in 12 C.F.R. 564.4(a) (1987); thus, the amount of deposit insurance was limited to $100,000 under 12 C.F.R. 564.4(b) (1987). Pet. App. A12-A13. That determination was based on the FDIC's longstanding view that Section 564.4

"refer[s] to the person who owned the funds when they were *initially* deposited into the trust account —in this case, Bremond—*unless* that person can produce extrinsic evidence that she intended to make a gift of all or part of the funds to the additionally named 'grantor'." Pet. App. A4.

The FDIC found that there was no extrinsic evidence of such a transfer. Pet. App. A5, A15. Indeed, Bremond and Bremond-Piquet had admitted in a written declaration to the FDIC that Bremond alone had contributed 100% of the funds deposited in the account. *Id.* at A12, A15. Based on that declaration, the FDIC rejected a later declaration in which the sisters claimed to be co-owners of the funds. *Id.* at A15. The FDIC also determined that neither the standardized language in the trust agreement that purported to characterize the contribution of each grantor as a gift to all other grantees nor the periodic rolling over of the Vernon CD sufficed to prove a genuine transfer. *Id.* at A5.

3. Petitioners brought this action in the United States District Court for the District of Columbia challenging the FDIC's interpretation of 12 C.F.R. 564.4 (1987). The district court granted the FDIC's motion to dismiss the action. Pet. App. A11-A16; see also *id.* at A2. The court held that "[t]he FDIC acted reasonably and in full compliance with the governing statute and regulations in concluding that Bremond alone owned the funds deposited" and in limiting the amount of deposit insurance on the account to $100,000. *Id.* at A15, A16.

4. The United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the FDIC's interpretation of 12 C.F.R. 564.4 (1987)

was reasonable. Pet. App. A1-A10. The court observed that the agency's interpretation accorded with the text of the regulation:

> As the FDIC points out, § 564.4(a) itself refers to "[f]unds *owned* by an individual and *invested* in a revocable trust account" (emphasis added). It argues, reasonably enough, that this refers to a person who initially *owns funds* and *then invests* them in the trust account, so that the identity of the "owner" under the regulation will normally be fixed at the time of the initial investment.

Id. at A6. The court also observed that the FDIC had applied that interpretation "consistently and repeatedly." *Ibid.* The court concluded that the agency's longstanding interpretation was "entirely reasonable" in light of "the potential for expansion of FDIC coverage through manipulation of revocable trust accounts, and stated congressional concern over just such manipulation." *Id.* at A7-A8.

The court rejected petitioners' reliance on the FDIC regulation on joint accounts, which stated that "[t]he interests of the co-owners of a joint account shall be deemed equal." 12 C.F.R. 564.2(b)(3) (1987). The court noted that "the regulations elsewhere indicate that the FDIC considers 'joint accounts' and 'testamentary accounts' to be separate animals, subject to separate regulations." Pet. App. A8. The court accordingly held that the FDIC's "non-application" of the joint account regulation was "reasonable." *Ibid.*

The court also rejected petitioners' reliance on the fact that Bremond-Piquet had the power of revocation, and that a sentence in an appendix to the FDIC regulations stated that "the person who holds the

power of revocation is deemed to be the owner of the funds in the account." 12 C.F.R. Pt. 564, App. at 463 (1987). The court accepted the FDIC's explanation that this statement "[wa]s intended merely to distinguish the 'true' owner, who must have the power of revocation, from someone acting purely as a trustee or fiduciary." Pet. App. A9. The court observed that the FDIC's explanation was supported by the context in which the statement occurred. *Ibid.*

ARGUMENT

This case presents a single, narrow issue: whether the FDIC reasonably interprets 12 C.F.R. 564.4 (1987) —which calculates the amount of federal deposit insurance on revocable trust accounts by reference to the relationship between the beneficiaries of the trust and the owner of the funds in the account—to refer to the person who initially owned the funds and invested them in the account, in the absence of extrinsic evidence of a subsequent transfer of the funds. The court of appeals correctly held that the FDIC's interpretation is reasonable, and that holding does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court's decisions make clear that an agency's interpretation of its own regulation is entitled to great deference. See, *e.g.*, *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). "[P]rovided an agency's interpretation of its own regulation does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson*, 113 S. Ct. at 1919 (internal quotation marks omitted). Peti-

tioners contend (Pet. 10-17) that the FDIC's interpretation of 12 C.F.R. 564.4 (1987) is inconsistent with the plain language of both the regulation itself and the statute that it implements. That contention is without merit.

Nothing in the language of the relevant statute forecloses the FDIC's interpretation. Section 1728(a) of Title 12 (now repealed) broadly provided that "no member or investor * * * of any [federally insured thrift] institution shall be insured for an aggregate amount in excess of $100,000." 12 U.S.C. 1728(a) (1988). Section 1728(a) did not, however, specify how the $100,000 limit on insurance applied to revocable trust accounts. Instead, Section 1728(a) authorized the FSLIC, "[f]or the purpose of clarifying and defining the insurance coverage under this subsection," to "define * * * the extent of the insurance coverage resulting [from the provision]." 12 U.S.C. 1728(a) (1988). Thus, the statute afforded the FSLIC exceedingly broad discretion in defining the operation of the $100,000 limit on insurance. See *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977). Petitioners err in asserting that the FDIC's interpretation of a regulation adopted by the FSLIC in the exercise of its broad statutory discretion conflicts with the text of the statute.

Nor is there any conflict between the FDIC's interpretation of Section 564.4 and the text of that regulation. As the court of appeals correctly recognized, the language of the regulation supports the FDIC's interpretation. Section 564.4 requires the agency to identify the person who initially owns funds and then invests them in the revocable trust account. Thus, as the court of appeals stated, "the identity of the

'owner' under the regulation will normally be fixed at the time of the initial investment." Pet. App. A6. The FDIC's interpretation comports with the regulation by treating the contributor of the original funds as the owner of the account in the absence of evidence of a subsequent transfer.

Petitioners' challenge to the FDIC's interpretation of Section 564.4 is based, not on the regulation itself, but on the regulation governing joint accounts and on a sentence in the appendix to 12 C.F.R. Pt. 564 (1987). The regulation on joint accounts, however, is inapposite; as the court of appeals explained, joint accounts and revocable trust accounts are treated as "separate animals" under the FDIC's regulations. Pet. App. A8; accord *Goldin* v. *FDIC*, 985 F.2d 261, 264 (6th Cir. 1993). In any event, petitioners would have been entitled to only $100,000 of deposit insurance under the joint account regulation. See 12 C.F.R. 564.9(d) (1987) ("All joint accounts owned by the same combination of individuals shall first be added together and insured up to $100,000 in the aggregate."). Thus, petitioners' reliance on that regulation is misplaced.[3]

The sentence in the appendix to 12 C.F.R. Pt. 564 (1987) on which petitioners rely likewise provides no support for petitioners' position. That sentence, when read in context, merely indicates that the power

[3] Petitioners rely on subsection (a) of 12 C.F.R. 564.9 (1987) ("Joint accounts") to argue (Pet. 11) that Bremond and Bremond-Piquet were co-owners of the revocable trust account. Even if 12 C.F.R. 564.9 (1987) were applicable to revocable trust accounts—which it is not—the regulation would not support petitioners' position. Subsection (a) provides the legal requirements for separate insurance coverage of a joint account; it does not address how ownership of the funds in a joint account is to be determined.

of revocation is a necessary, but not a sufficient, condition of ownership. See Pet. App. A9.[4]

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[4] The appendix to 12 C.F.R. Pt. 564 (1987) is entitled "Examples of Insurance Coverage Afforded Accounts in Institutions Insured by the [FSLIC]." Section B of the appendix addresses "Testamentary Accounts." Petitioners rely on a sentence (which we have italicized) in the following paragraph, which introduces the examples set forth in Section B of the appendix:

> The term "testamentary account" refers to a revocable trust account, tentative or "Totten" trust account, "payable-on-death" account or any similar account which evidences an intention that the funds shall pass on the death of the owner of the funds to a named beneficiary. If the beneficiary is a spouse, child or grandchild of the owner, the funds in all such accounts are insured for the owner up to $100,000 in the aggregate as to each such beneficiary, separately from any other individual accounts of the owner. If the beneficiary of such an account is other than a spouse, child or grandchild of the owner, the funds in the account are, for insurance purposes, added to any other individual accounts of the owner and insured up [to] $100,000 in the aggregate. *In the case of a revocable trust account, the person who holds the power of revocation is deemed to be the owner of the funds in the account.* If a revocable trust account is held in the name of a fiduciary other than the owner of the funds, any other accounts held by the fiduciary are insured separately from such revocable trust account.

As the FDIC explained in the court of appeals, and the court accepted, the sentence on which petitioners rely "is intended merely to distinguish the 'true' owner, who must have the power of revocation, from someone acting purely as a trustee or fiduciary." Pet. App. A9. That explanation is confirmed by the next sentence in the paragraph, which provides that accounts owned by a fiduciary who lacks the power of revocation are not taken into account for insurance purposes. Further support is provided by one of the subsequent illustra-

2. Petitioners also contend (Pet. 17-29) that the FDIC erred in relying on the *FSLIC Manual for Insurance Determinations*. That contention does not withstand scrutiny.

Petitioners first argue (Pet. 21-22) that the FSLIC manual provides insufficient guidance on the extrinsic evidence needed to establish that a grantor has transferred funds in a revocable trust account to another grantor. Petitioners, however, provided no extrinsic evidence to support their claim that Bremond made a gift to Bremond-Piquet of the funds that she owned and invested in the revocable trust account. In fact, Bremond and Bremond-Piquet furnished evidence that no such transfer had occurred when, in 1988, they submitted to the FDIC a written declaration stating that Bremond owned 100% of the funds. Pet. App. A5. Finally, as the court of appeals observed, "[t]he most obvious example of such evidence would be a gift tax return of the supposed donor or an income tax return of the added grantor reflecting receipt of income from her life interest." *Id.* at A4. That petitioners were unable to supply such evidence results from their failure to effect a genuine transfer, and not from any inadequacy in the FSLIC manual.

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tive examples, which characterizes a husband and wife who have each contributed $200,000 to a revocable trust account as the "owner of one-half of the funds in the account." 12 C.F.R. Pt. 564, App. at 463 (1987) (example 4). As the court of appeals explained, "[u]nless the FDIC's premise about the centrality of original ownership were correct, the example would presumably refer to both spouses as 'owners' rather than specifying the proportion of each one's ownership interest, which simply reflects their respective original contributions." Pet. App. A9.

Petitioners also argue (Pet. 22) that, because the FSLIC manual was unpublished, they had inadequate notice of the manner in which their account would be treated for insurance purposes. As the court of appeals observed, however, the language of 12 C.F.R. 564.4 (1987) provided ample notice that the owner of a revocable trust account is ordinarily established at the time of the initial investment. Moreover, the FDIC had made clear in three publicly available insurance determinations—two dated prior to Vernon's failure and one dated prior to FSLIC's initial determination—that it would consider the original investor to be the owner of a revocable trust account in the absence of extrinsic evidence of a subsequent transfer. Pet. App. A7 (citing FDIC decisions).[5]

[5] Petitioners also argue (Pet. 24-27) that the FSLIC manual was subject to the notice-and-comment rulemaking procedures prescribed in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* That argument was not raised in the courts below, however, and petitioners are not entitled to advance it for the first time here. See, *e.g.*, *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992); *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955). In any event, the relevant provisions in the FSLIC manual are exempt from the notice-and-comment procedures of the APA. See 5 U.S.C. 553(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ALFRED J.T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
THOMAS L. HOLZMAN
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